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Daniel Webster as Tocqueville's Lawyer: The *Dartmouth College* Case Again

by R. KENT NEWMYER*

DANIEL WEBSTER WAS A GREAT LAWYER, as every schoolboy knows, and a conservative one—i.e., his legal efforts were made consistently in behalf of the commercial elite. From 1814 until his death in 1852, he argued 168 cases before the Supreme Court (in addition to his practice in state and lower federal courts). Among this number were many of the leading constitutional cases of the formative period of American law—*McCulloch v. Maryland* (1819), *Dartmouth College v. Woodward* (1819), *Gibbons v. Ogden* (1824), *Ogden v. Saunders* (1827), and *Charles River Bridge v. Warren Bridge* (1837), to mention only the most outstanding. Given the prominence of Webster's legal career, it is remarkable that so little effort to understand it has been made. Abundant celebrations of his legal logic, eloquence, and nationalism there have been—enough, indeed, to embalm Webster in his own reputation. Not yet, however, has there been a study of Webster the lawyer which deals fully with his technique of advocacy, his legal philosophy, his professional and class ties, and the mutual complementarity of his legal and political careers.¹ Needed in such a study is an organizing theme which goes beyond the ordinary case-by-case analysis and puts lawyer Webster fully in the context of his age.

Alexis de Tocqueville's concept of the American lawyer, developed briefly in his *Democracy in America*, I suggest, provides

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¹ Materials for such a study exist. There is no complete body of Webster's legal papers available, but among the extensive Webster manuscripts (especially those in the New Hampshire Historical Society and Dartmouth College Archives) there are valuable untapped materials, legal and otherwise, which throw light on Webster the lawyer. Nearly 350 pages of Webster's most famous legal arguments have been printed in the national edition of his writings and speeches. In many cases, too, the *U. S. Supreme Court Reports*, Lawyer's Edition, contains summary accounts of Webster's arguments. Maurice Baxter's forthcoming study of Webster as a lawyer promises to pull these and other materials together into a full and much-needed study of Webster's legal career.

one such interpretive theme. When brought to bear on some old and new facts, Tocqueville throws light on Webster's professional and class connections and the relationship in his career between law and politics which helps explain his greatness as both a lawyer and statesman. Hopefully, in the process of applying Tocqueville to Webster, the former's relevance to an understanding of the nineteenth century bench and bar will be apparent.

Several of Tocqueville's insights are pertinent to the undertaking: First. He saw in the legal profession a class solidarity based upon a respect (derived from the study of the common law) for property and ordered change and intensified by a "certain contempt" for ordinary people whose interests they arbitrated. Second. The lawyer, he perceived, commanded the tools and the language of political action, which in turn gave him a monopoly of the judicial branches of the state and national governments and a preponderance in the legislative branches. Law merged with politics; lawyers became politicians. Third. Given their propensity toward conservatism and their control of the political process, the lawyer class naturally gravitated toward the economic elite, the group that needed the lawyers and could pay the fees. In America, where wealth and nobility were suspect, where there was no "literary elite," the legal profession itself formed "the highest political class and the most cultivated portion of society."² Lacking the distasteful trappings of European high society, frequently bound to the people by birth, lawyers became the only aristocrats that a democracy could produce or tolerate.

Tocqueville's commentary was not news to contemporary Americans. Long before he noted the connection between law and the good life, hundreds of aspiring young Americans—varying in persuasion from Alexander Hamilton to Andrew Jackson—had sensed that legal learning opened the door to political power and to economic and social prominence. Few grasped the message more surely or acted on it more deliberately than a talented, ambitious New Hampshire farm boy by the name of Daniel Webster. Rural New Hampshire, he saw quickly, was a poor place either to learn law or use it. After a halting start at legal apprenticeship in a local law office (where black letter was too frequently relieved by *belles lettres*—and pretty company), he pulled up stakes for larger fields. Commercial, cosmopolitan, cultured, and powerful Boston afforded all that ambition desired. In 1804, with no money and few connections but with a large determination to learn some law and

² *Democracy in America*, trans. Henry Reeve (2 vols., Vintage ed., 1959), vol. 1, 288. Tocqueville's discussion of the American bench and bar is found on pages 282-290.

make his way into the Massachusetts power elite, Daniel Webster went south.

The Boston law office of Christopher Gore was the ideal place, legally and politically, to launch a career. Gore was one of the city's most distinguished commercial lawyers and moved easily in the rarefied atmosphere of Massachusetts high politics. With a fine legal library at his disposal, with friendly, informed direction from his mentor—and with the levity of earlier days appropriately subdued—Webster sharpened his legal tools and demonstrated his Federalist orthodoxy. His usefulness to the cause of Federalism became apparent, and he was, in Tocqueville's words, invited to share the "family interests." Only a few of the old Tie Wigs reserved judgment.³

That a complementary fusion of law and politics aided Webster's rise to prominence is suggested not only by the nature of his debut into Federalist politics but by his simultaneous advancement in both fields.⁴ As he rose in the esteem of Federalist leaders after 1804, he acquired increasing status in the local, state, and federal courts in New England. At the same time, in law and politics, he moved on to the national arena—in 1813 as Federalist member of the United States House of Representatives from New Hampshire and in 1814 as counsel before the bar of the Supreme Court of the United States.

In neither field, however, did he immediately lay claim to national greatness. His politics were pertinaciously sectional and his arguments before the Supreme Court, though competent and promising, were not yet such as to bring national acclaim. Webster needed a cause and an occasion to establish himself as a legal light and a national statesman. *Dartmouth College v. Woodward* (1819)⁵ filled the bill exactly. The manner in which he exploited the potential of this opportunity puts his talents into sharper focus and illuminates nicely the symbiotic nature of law and politics and the unity and strength of the conservative portion of the bench and bar.

³ "There is something about this man not exactly what one would wish . . .," observed Otis in 1819 as he assessed Webster's qualifications for the "best class"; "for my part I believe the foundation is unstable and I shall experience no surprise if the edifice trembles—I hope it may not fall." H. G. Otis to Mrs. Otis, Jan. 18, 1819, *H. G. Otis Papers*, Mass. Hist. Soc.

⁴ Even during his early legal apprenticeship, he kept a finger in politics by writing political tracts for local newspapers. Warren Dutton to George Ticknor, n. d., *Webster MSS*, 000491, Dartmouth College Archives.

⁵ 4 Wheat. 518 (1819).

The *College* cause set a perfect stage for Webster, for it touched the sensitive nerve ends of political conservatism and nascent industrial capitalism: the continuation of unfettered private educational institutions (many of which, like Dartmouth and Harvard, were sympathetic to conservative principles and conscious of their conservative responsibilities); and the power of democratic state legislatures to meddle with private property and regulate corporate rights. The audience was as formidable as the case was critical. Already apprised of the issues at stake by the arguments in the New Hampshire Supreme Court,⁶ the "elite of the profession throughout the country" crowded into the cramped chambers of the Supreme Court. With a case and an audience like this, a man could make his mark—or relegate himself to obscurity.

Webster was ready for fate. On March 10, 1818, he opened for the College, for political conservatism, for economic nationalism—and for Daniel Webster. For over four hours, "in the calm tone of easy and dignified conversation," he unfolded an inimitable blend of common sense, sound policy, and legal logic, playing deftly on all the conservative issues at stake. Only for a brief moment (chosen with an artist's sense of timing and pathos) did he descend from law and policy to sentiment, confessing a loyal son's love of his beleaguered school. Overcome by his own rhetoric, he returned to his seat in tears.

Webster had risen to the challenge. Testimony has it that the audience was with him. The Justices, too, had been captivated even if all had not been convinced. Justice Story had been so engrossed by Webster's performance that he had uncharacteristically not taken a single note—though he sat poised, pen in hand.⁷ John Holmes, whose incapacity accentuated Webster's brilliance, came on for the state late the first day and finished the morning of the second; William Wirt followed in the afternoon and completed his argument the next morning. Webster's colleague Joseph Hopkinson—a "host" in himself—finished for the College with solid, unadorned competence. The Court was divided and the case held over until the following term. Victory was complete when Chief Justice Marshall held for Dartmouth College in an opinion which went "the whole length," and left, in Webster's words, "not an inch of ground for the University to stand on."⁸

⁶ *Dartmouth College v. Woodward*, 65 N. H. 473 (1817).

⁷ For the description of Webster's argument before the Court see Chauncey A. Goodrich to Rufus Choate [photocopy], Nov. 25, 1852, *Webster MSS*, 852625.1, Dart. Coll. Arch.

⁸ Daniel Webster to Ezekiel Webster, Feb. 2, 1819, *The Writings and Speeches of Daniel Webster*, ed. James W. McIntyre, (18 vols., 1903), vol. 17, 300. Cited hereafter as *Writings and Speeches*.

"We read, in the lives of several great lawyers," B. R. Curtis, Jr. once observed, "of some occasion happily availed of for the display of powers until then unknown, and which has been the stepping-stone to the subsequent career . . ."⁹ The *College* case was Webster's stepping-stone. Here in the national arena provided by the Supreme Court, in a single "lucky hit," he paraded his mastery of conservative policy, his legal talent, and his oratorical power. Webster himself knew he had scored a great triumph. "Our College cause [he wrote to Hopkinson] will be known to our children's children. Let us take care that the rogues shall not be ashamed of their grandfathers."¹⁰ Even H. G. Otis's skepticism about Webster's ability and utility had been dispelled. Otis probably spoke for many of the Massachusetts mercantile-industrial elite when he conceded that Webster's "talents are of a high order . . . and lie now for the first time in a situation to display them to lucrative effect."¹¹

In looking to his reputation, Webster found professional unity eminently serviceable. Indeed, in an age when there was no national bar association and only incomplete and sporadic coverage of Supreme Court activities, the natural channels of profession and class were nearly indispensable vehicles for national fame. The *College* cause set the current flowing through these channels in behalf of conservative principles and their new champion. And by the summer of 1818 public opinion had responded. "When I came home," Webster observed on his return to New England, "I found good wishes for our success, in almost all quarters . . ." Good fortune needed to be prodded, however, and well wishers informed. The prod and the information came in the form of a "printing" (not a "publication," Webster was careful to point out) of an outline of the cause as it was argued by Webster before the Supreme Court. The production was for the discreet use of a "few friends," enabling them "to reason on the subject" and putting them "to thinking a little."¹²

Those "few friends," now provided with a correct view of things, began to utilize the ready-made social and professional network. Hopkinson was sent "two of these things," one for his own use and one for such among his "immediate friends" as he

⁹ B. R. Curtis, *A Memoir of Benjamin Robbins Curtis* (2 vols., 1879), vol. 1, 85.

¹⁰ Webster to Hopkinson, March 22, 1819, *Webster MSS* 819222, Dart. Coll. Arch.

¹¹ H. G. Otis to Mrs. Otis, Jan. 26, 1819, *H. G. Otis Papers*, Mass. Hist. Soc.

¹² Webster to Joseph Hopkinson, July 3, 1818, *Hopkinson Papers*, Pa. Hist. Soc.

thought proper.¹³ Among these friends were the leading members of the powerful Philadelphia bench and bar. Judge Story, who had more legal connections and authority than any man in New England, was also given copies. Jacob McGaw of Boston, a friend from Webster's law apprenticeship days in New Hampshire, received the "sketch" with the advice to show it "to any professional friend, in your discretion," though "cautiously," Webster warned, since "general decorum, seems to prohibit the *publishing* of an argument, while the cause is pending."¹⁴ A copy of the argument was even given Dartmouth students, though Webster feared that, in their "zeal in a good cause," they might "make an indiscreet use of it."¹⁵ It went without saying that Webster's friends and fellow counsel in the case, Jeremiah Mason and Judge Jeremiah Smith, were beating the drums in the North country.

New York had to be brought around, too. Francis Brown, president of Dartmouth and Webster's close adviser during the crisis, was dispatched with copies of the printed argument to mobilize the bench and bar of that state for his college and his friend Webster. Chancellor James Kent, the behemoth of the profession in New York, was the logical person for Brown to persuade first. Brown's success was complete. "There is no doubt," he reported back to Webster, "that by the Argument & the Charter he is brought completely over to our side; & he has a full impression of the importance of the question. I believe he will take every proper & prudent measure to impart correct views to others." Brown took no chances, however, and carried his case personally not only to Governor DeWitt Clinton but to all the "greatest legal talents of the State," conveniently present in Albany for the session of the New York Court of Errors. The preponderance of the New York bench and bar, Brown assured Webster, is "unquestionably in our favour. The whole is," he added, "of course, attributable to you."¹⁶

Surveying the field from home ground four days later, Brown was satisfied that "all the *commanding* men of New England & New York" had been united "in one broad & impenetrable phalanx for our defense & support." Indeed, the current of Northern opinion was "setting so strongly towards the south, that we may safely

¹³ Webster to Joseph Hopkinson, *Hopkinson Papers*, *op. cit. supra*. Note 12.

¹⁴ Daniel Webster to McGaw, July 27, 1818, *Webster MSS* 818427, Dart. Coll. Arch.

¹⁵ Webster to Francis Brown, July 16, 1818, *Writings and Speeches*, *op. cit. supra*. Note 8, at 284.

¹⁶ Brown to Webster, Sept. 15, 1818, *Webster MSS* 818515, Dart. Coll. Arch.

trust to its force alone to accomplish whatever is necessary."¹⁷ This current to the south, it might be added, was assuredly urged on by Hopkinson's influence with Philadelphia friends and by B. J. Gilbert's proselytizing mission (with the charter in hand) to Chief Justice Marshall in Richmond.¹⁸ Thus, within four months from his argument before the Court, the case for Webster's principles and prowess had received a national hearing through the professional grapevine. In an age when it took two weeks to get from Maine to Georgia, if the weather was good, this was some accomplishment.

The conservative professional elite did more than advertise Webster's greatness. It offered him, as a prerogative of his position as leader of the bar and legal spokesman for the gathering forces of corporate capitalism, generous access to the reservoir of legal talent. Cooperation among lawyers, of course, was the common practice, and Webster had acquired the habit early in his career. But the importance and fame of the *College* cause expanded Webster's network of connections to include many national leaders of the bench and bar. Their efforts, in fact, contributed measurably to his victory in that case, and the pattern of cooperation established continued to sustain his professional and political reputation for the rest of his life.

In the *College* cause, Jeremiah Smith and Jeremiah Mason, two of New England's most accomplished lawyers, gave indispensable support to Webster.¹⁹ They had, with some modest help from Webster, handled the cause before the New Hampshire Supreme Court. With the full knowledge that his own preparation was inadequate, but with the comforting assurance that the labors and talents of Mason and Smith would be at his disposal, Webster agreed to take the case to Washington. "Judge Smith has written to me," he wrote candidly to Mason, "that I must take some part in the

¹⁷ Brown to Webster, Sept. 19, 1818, *Webster MSS* 818519, Dart. Coll. Arch.

¹⁸ Gilbert was apparently unable to see Marshall but saw to it that the Chief Justice got a copy of the charter and that the case for the *College* got into the newspapers. Charles G. Haines, *The Role of the Supreme Court in American Government and Politics 1789-1835* (1960), 401.

¹⁹ "If you asked me who is the greatest lawyer I have known," Webster once remarked, "I should say Chief Justice Marshall, but if you took me by the throat and pushed me to the wall, I should say Jeremiah Mason." Quoted in Aumann, *The Changing American Legal System*, 165. As for Judge Smith's knowledge of the law, "he knows so much more of it than I do, or ever shall," confessed Webster, "that I forbear to speak on that point." Webster to Chancellor Kent, May 23, 1825, *Writings and Speeches*, *op. cit. supra*. Note 8, at 384.

argument of this college question. I have not thought of the subject, nor made the least preparation; I am sure I can do no good, and must, therefore, beg that you and he will follow up in your own manner, the blows which have already been so well struck."²⁰

Immediately he began to draw on his credit. "If it is not too troublesome," he added, "please let Mr. Fales give me a naked list of the authorities cited by you, and I will look at them before court. I do this that I may be able to understand you and Judge Smith."²¹ Two months after this appetizer, he was ready for the full course. "If I go to Washington, and have this cause on my shoulders, I must have your brief, which I should get of course without difficulty, and Judge Smith's."²² With disarming candor, calculated exaggeration, and friendly flattery, he brought Judge Smith to the task at hand. "If I argue this cause at Washington, every one knows I can only be the reciter of the argument made by you at Exeter. You are, therefore, principally interested, as to the matter of reputation, in the figure I make at Washington. Nothing will be expected of me but decent delivery of your matter."²³ To guarantee that "decent delivery," to insure Smith's reputation—and to help make his own—Webster requested Smith's notes on the case, "all of them."²⁴

In the legal battle which raged on after the Court's inability to decide the cause in the 1818 term, Webster received a discreet bit of tactical direction from none other than Justice Joseph Story. Given their mutual dedication to the law and their agreement on the New England version of political-economic policy, it was natural that they should have established a close friendship. That friendship, because of the Judge's immense talent, his limitless energy, and his deep concern for the establishment of sound conservative principles of government, began to work for Webster as early as 1816.²⁵ The threat to Dartmouth, private education in general, and corporate property at the hands of state legislatures deepened their working relationship.

²⁰ Webster to Mason, Sept. 4, 1817, *Writings and Speeches, op. cit. supra*. Note 8, at 266.

²¹ Webster to Mason, *Writings and Speeches, op. cit. supra*. Note 8, at 266.

²² Webster to Mason, Nov. 27, 1817, *Writings and Speeches, op. cit. supra*. Note 8, at 266.

²³ Webster to Smith, Dec. 8, 1817, *Writings and Speeches, op. cit. supra*. Note 8, at 268.

²⁴ Webster to Smith, Jan. 9, 1818, *Writings and Speeches, op. cit. supra*. Note 8, at 269.

²⁵ See, for example, Webster to Story, Dec. 9, 1816, *Mass. Hist. Soc., Proceedings*, 2d Series, vol. 14, 399.

Whether Story consulted with counsel for the College before the argument at Washington in March, 1818, is uncertain, though there is some evidence that he did.²⁶ There is no doubt that, in the summer following the argument, while the Court's decision was pending and with the possibility of new arguments, he extended a useful helping hand to Webster and Dartmouth. Story was one of those "few friends" who received copies of the printed outline of Webster's argument: "send one of them to each of such Judges as you think proper . . .," Webster suggested.²⁷ Story, in fact, urged Webster to publish a full account of the case so that the whole profession might understand the great issues at stake—and proof-read the production for him.²⁸

More valuable yet was Story's advice to Webster on the strategy of the litigation. From the outset, Webster had regretted that the case before the Supreme Court, coming up as it did on a writ of error, was limited to the question of whether the New Hampshire law regulating the College government was repugnant to the contract clause of the United States Constitution.²⁹ A cause which broached the whole issue of legislative encroachment on vested rights would have afforded a better opportunity for a conclusive victory.³⁰ The Court's indecision after the first argument and the knowledge that the formidable William Pinkney had been retained

²⁶ "I saw Judge Story as he went on," wrote Webster to Mason, Jan., 1818, previous to the argument before the Supreme Court. "He said he had had a correspondence with you about 'things'; but company being present, did not say what things." Jan., n.d., 1818, *Writings and Speeches*, *op. cit. supra*. Note 8, at 271.

²⁷ Webster to Story, Sept. 9, 1818, *Writings and Speeches*, *op. cit. supra*. Note 8, at 287.

²⁸ Haines, *op. cit. supra*. Note 18, at 415.

²⁹ Webster to Smith, Dec. 8, 1817, *Writings and Speeches*, *op. cit. supra*. Note 8, at 267.

³⁰ In fact, in his argument before the Court, he ranged far beyond the technical limits of the constitutional question and was sharply criticized for having done so. "Mr. Webster did not confine himself to the case stated . . ." noted Salma Hale to Levi Woodbury, March 17, 1818, *Gist Blair Collection*, Lib. of Cong. Earlier Hale had spoken of Webster's opening arguments as "very disingenuous." Hale to Woodbury, March 11, 1818, *Gist Blair Collection*, Lib. of Cong. Webster was sensitive to the charge. "The rogues here in congress, complain that the cause was put on grounds not stated in the court below," he noted to Smith, March 14, 1818, *Writings and Speeches*, *op. cit. supra*. Note 8, at 277. It might be added that Story obliged Webster's latitudinous efforts with an equally wide-ranging concurring opinion based on, among other things, the doctrine of implied limitations. *Dartmouth College v. Woodward*, 4 Wheat. 666-713, especially 694-695.

to reargue the case against the College at the 1819 term made the notion of a broader-based case even more attractive.³¹

As early as December 8, 1817, Webster had considered bringing the cause into the United States circuit court on diversity of citizenship jurisdiction where a division *pro forma* of the district and circuit judges, if it could be arranged, would bring "the whole question" before the Supreme Court.³² Story seems to have been consulted at this early stage, for Webster remarked that he had "thought of this the more, from hearing sundry sayings of a great personage."³³ By the next spring the strategy had matured: "Judge Story has been recently in town," wrote Webster to Mason, April 23, 1818, "I have no doubt he will incline to send up the new cause in the most convenient manner, without giving any opinion, and probably without argument. If the district judge will agree to divide without argument, *pro forma*, I think Judge Story will incline so to dispose of the cause."³⁴

Five days later, when Webster wrote to Mason, the matter seemed to be settled: "I saw Judge Story as I came along. He is evidently expecting a case which shall present all the questions."³⁵ By midsummer, Webster informed his colleague Joseph Hopkinson that the strategy had been executed with every prospect of success: "The new actions are brought; & are in a fair way to go up, in a favorable shape the next term. There was a good deal of ingenious painstaking to defeat the suits by abatement &c, but without success. The *Judge* said it was important that a cause should go up, embracing all the questions. I should not have great doubt of *his* opinion, when we get the questions *fairly & broadly up*."³⁶

³¹ For an excellent discussion of the whole question of possible reargument, see Maurice G. Baxter, "Should the Dartmouth College Case Have Been Reargued?," *New England Quarterly*, vol. 33 (March, 1960), 19-36.

³² Webster to Smith, Dec. 8, 1817, *Writings and Speeches, op. cit. supra*. Note 8, at 267. Baxter's article, "Should the Dartmouth College Case Have Been Reargued?," contains a lucid discussion of the cognate causes.

³³ Webster to Smith, Dec. 8, 1817, *Writings and Speeches, op. cit. supra*. Note 8, at 267.

³⁴ Webster to Mason, April 23, 1818, *Writings and Speeches, op. cit. supra*. Note 8, at 281.

³⁵ Webster to Mason, April 28, 1818, *Writings and Speeches, op. cit. supra*. Note 8, at 282.

³⁶ Webster to Hopkinson, July 3, 1818, *Hopkinson Papers*, Pa. Hist. Soc. The cognate cases (not reported in *Federal Cases*) brought in the circuit court at Portsmouth in May, 1818, were *Hatch v. Lang*; *Pierce ex dem. Lyman v. Gilbert*; *March v. Allen*. Baxter, *op. cit. supra*. Note 31, at 26.

The Court's refusal at the February term to hear new arguments and Chief Justice Marshall's sweeping interpretation of the contract clause of the Constitution as a shield against legislative interference with corporate property made the strategy of the cognate cases superfluous. Their continuation might, in fact, have proved dangerous to the College, since counsel for the University had begun to gather new data purporting to establish the public nature of the institution and thus proving the legality of state control. Judge Story, encountering the cases at the May, 1819 term of the Circuit Court at Portsmouth, relieved the danger by disposing of them according to the Supreme Court decision—despite the fact that he had labored for their introduction.³⁷

The *Dartmouth College* cause in the large sense was obviously something more than Webster's show. His dependence on Mason and Smith for his law was substantial, though no more than the ethics and practice of advocacy allowed. Legal strategy, too, was collective and included the subtle guiding hand of Justice Story. The Supreme Court's favorable ruling itself was due as much or more to the brilliant and bold improvisations of Marshall on the contract clause as to the arguments of counsel. Finally, the educative impact of the case on professional and public minds, the spread of conservative principles of law and political-economy, including the advertisement of their new spokesman, was in the largest sense the collective accomplishment of a unified and conservative professional elite. Webster, as we have seen, did not disguise, to himself or to his friends, the extent of his indebtedness. No public acknowledgment was made, however, and contemporaries bestowed the laurels of victory on him alone. But the ironical truth remains that the influential *College* case—and Webster's career launching—were really a joint venture which brought into action a powerful arm of Tocqueville's legal aristocracy.

After the College debut, Webster rose rapidly in both law and politics. In the decade after 1819 he argued seventy-two Supreme Court cases, including the most important ones. By the early thirties he had become the spokesman for New England's political-economic version of nationalism. For services rendered, he succeeded James Otis, Sam Adams, and Theophilus Parsons as "Pope" of Boston.³⁸ As he defended New England policy against Southern

³⁷ In short, Story refused to admit that the "new facts" of counsel for the University altered the private nature of the corporation as established by the charter. Baxter, *op. cit. supra*. Note 36, at 29.

³⁸ B. Waterhouse to Levi Woodbury, Feb. 9, 1835, *Papers of Levi Woodbury*, Lib. of Cong.

objections, he emerged as the champion of Union and "expounder of the Constitution." It was as a prerogative of this lofty position that Webster was allowed to draw freely, *a la mode Dartmouth College v. Woodward*, on the talents of the "church"—as Henry Adams called the commercial-professional elite. For the fact is that the talented reserves called into action in the Dartmouth College crisis had not been allowed to disband but had been augmented and kept active in behalf of conservative nationalism and Daniel Webster. The political crusades in which this body of the faithful served their political pontiff were among the most vital of the age.

None was more so than the conservative struggle to contain the invading forces of Jacksonian Democracy. The citadel to be defended at all costs was the Second Bank of the United States. Because of its wealth, power, and complex legal business, the Bank commanded an imposing phalanx of legal talent.³⁹ Webster made his legal debut into this exclusive professional group as counsel for the Bank in *McCulloch v. Maryland* (1819), and from that time on was for practical purposes under permanent retainer⁴⁰—one of the "forty two pounders," as Nicholas Biddle once put it. Under the presidency of Biddle (1823-1836), he became, along with John Sergeant, a kind of major domo in the Bank's legal house, advising Biddle, directing legal strategy, arguing cases, and procuring legal talent for the Bank. When the institution became the political battleground of the 1830's (which it did in part because of Webster's advice), he became its stalwart champion in the United States Senate. In both the legal and political phases of the Bank War—and the two were inextricably fused—Webster turned for sustenance to fellow members of the conservative establishment.

Judge Joseph Hopkinson, Webster's colleague in the *College*

³⁹ In addition to Webster, the 2d Bank of the United States counted heavily on such legal heavyweights as William Pinkney (who won the day in *McCulloch v. Maryland*, the Bank's greatest victory) and the powerful Philadelphians, Horace Binney and John Sergeant. (For example, see their folders in the Simon Gratz Collection, Pa. Hist. Soc.) Attorney General of the United States William Wirt (who was allowed private practice) was a powerful and consistent legal counsel for the Bank. "I have been engaged in important business for the Bank of the U. S. & several of its branches," he wrote in 1822, "and in no case yet against them." Wirt to John White, April 13, 1822, Letter Book, May 10, 1816-July 26, 1832, *Wirt Papers*, Lib. of Cong. He would not appear against the Bank, he added, without first giving it the option of his services.

⁴⁰ Webster was sensitive about his close connection with the Bank, especially during the Bank War when his connection was publicized: Webster to Nicholas Biddle, July 1, 1831, *Webster MSS* 831401.1, Dart. Coll. Arch.

cause, was among those recruited. "Will you do me the favour to read the reasons of the Secretary," wrote Webster in reference to Secretary of the Treasury Taney's removal of the public money from the Bank, "and give me your thoughts on one or two topics."⁴¹ To have refused would have been ungrateful in the extreme, since it was largely due to Webster's efforts that Hopkinson became judge for the eastern district of Pennsylvania.⁴²

Justice Joseph Story, another veteran of the *College* battle, was even more formidable support against Jackson's Bank policy. "You may have seen that [veto] message," Webster wrote to the Judge on July 21, 1832:

My wish is to give a full answer to its *trash* on the Constitutional question. That is Taney's work. The argument, you perceive is, that *some* powers of the Bank are not *necessary*, and so not Constitutional. Now, my dear Sir, the object of this is to request you to turn to the message, read this part of it, & give me in a letter of three pages a close & conclusive confutation, in your way, of all its nonsense in this particular. It will take you less than half an hour.⁴³

Story's reply was probably among the Story letters which Webster destroyed.⁴⁴ In answer to another request, however, Story forwarded to Webster, on December 25, 1833, a detailed legal and political argument against the President's power of removal of the deposits and the illegality of depositing public funds in the state banks.⁴⁵ Webster incorporated Story's advice into his powerful Senate speech of May 7, 1834, in reply to Jackson's protest against his censure by the Senate.⁴⁶

In another phase of the struggle, the conservative counter-

⁴¹ Webster to Hopkinson, Dec. 18, 1833. *Hopkinson Papers*, Pa. Hist. Soc.

⁴² Although out of the domain of his Senatorial influence, Webster worked assiduously for Hopkinson's appointment. Richard Peters wrote Hopkinson, Feb. 12, 1829, with "good hopes" for Senatorial confirmation of his nomination, and added that "Webster is working all he can, and he is a giant when he gets to work." *Hopkinson Papers*, Pa. Hist. Soc.

⁴³ Webster to Story, July 21, 1832, Mass. Hist. Soc., *Proceedings*, 2d Series, vol. 14, 408-409.

⁴⁴ On Webster's refusal to release the Story letters in his possession, see *Life and Letters of Joseph Story*, ed. W. W. Story (2 vols. 1851), vol. 2, 408. Hereafter cited as *Life and Letters*.

⁴⁵ Story to Webster, Dec. 25, 1833, *Life and Letters*, *op. cit. supra*. Note 44, at 155-158.

⁴⁶ "The Presidential Protest," *Writings and Speeches*, *op. cit. supra*. Note 8, vol. 8 at 105-108.

attack against the President's right to remove office holders, Webster sought authoritative constitutional arguments from Chancellor James Kent. After politely disclaiming the right "to instruct a Senatorial Statesman, who has thought on the subject infinitely more than I have," the Chancellor proceeded so to instruct.⁴⁷ Judge Hopkinson was dunned again for "a very rough draft of a few *propositions*" on the President's removal power.⁴⁸

The counter-offensive against Jackson was no sooner launched than a second, even more portentous challenge to orthodoxy—nullification—faced Webster. Now fighting on two fronts, he turned again to America's great conservative legal mind, Chancellor Kent. (Judge Story, it was rumored, did not even wait for a summons but volunteered to pass the legal ammunition to Webster.)⁴⁹ Chancellor Kent's role was simple but important: The strategy, Webster wrote him, was to "*feign* that I have rec'd a letter from you, calling my attention to Mr. Calhoun's publication, and then, in answer to such supposed letter, to proceed to review his whole argument, at some length, not in the style of a *speech*, but in that of a cool constitutional & legal discussion." "The crisis is indeed portentous and frightful," responded Kent; in this "great battle of *Armageddon*," he would deem it an "honor" to march under Webster's flag.⁵⁰

The working relationship between Webster and his friends was not limited to the great issues of the Bank and states rights. He continued to call for and get support on public questions of state, national, and international moment. This pattern of cooperation, which touched private politics as well as public policy, lasted until the end of his career and included some of the nation's most distinguished and powerful professional and economic leaders. A full account of such activities is impossible. Most of the collaboration was undoubtedly done in private conversation and unrecorded; of that which was recorded, much has been lost or destroyed and the remainder is scattered. But a sampling of what remains attests to the impressive scope of Webster's connections and the advantage they offered him.

In his much esteemed defense of Harvard College in the Massa-

⁴⁷ Kent to Webster, Jan. 21, 1830 [copy]. *Papers of James Kent*, Lib. of Cong.

⁴⁸ Webster to Hopkinson, Friday eve., 11 o'clock, n. d., *Hopkinson Papers*, Pa. Hist. Soc.

⁴⁹ Peter Harvey, *Reminiscences and Anecdotes of Daniel Webster* (1877), 156.

⁵⁰ Webster to Kent, Oct. 29, 1832; Kent to Webster, Oct. 31, 1832, *Papers of James Kent*, Lib. of Cong.

chusetts Constitutional Convention of 1820, for example, Webster expeditiously used his connections with John Lowell—apparently without sufficient acknowledgment. “Mr. Webster’s celebrated report in favor of the College,” noted the unacknowledged author in understandable dudgeon, “was, but an amplification (with some beautifull [*sic*] sentences, and sound thoughts) of my written argument”—the one which Webster had previously requested.⁵¹ On national questions like the tariff Webster turned to those who knew. Abbott Lawrence freely supplied him with ideas; H. G. Otis did the same with principles and details.⁵² From Judge Hopkinson he sought out, and undoubtedly got, an informed view of the precarious structure of tariff politics.⁵³ Webster ranged widely for assistance in forensic and legislative efforts. Edward Everett gave him sources, substance, and inspiration on the Greek independence movement which Webster brilliantly championed in the House of Representatives. “I feel now as if I could make a pretty good speech for my friends the Greeks,” he wrote Everett, on December 21, 1823, “but I shall get cool in fourteen days, unless you keep up my temperature.”⁵⁴ The day following his request to Everett, he asked his old friend Jeremiah Mason to read the Report of the Judiciary Committee of the House of Representatives “on the subject of Courts” and to “write me your opinion, freely, thereon. . . .” Mason promptly sent back a detailed and erudite report.⁵⁵

Clearly the most useful of Webster’s conservative acquaintances was Justice Story.⁵⁶ Bound together by principle and affection, they worked for conservative truth in law, high politics, legislation, and foreign affairs. Habits of cooperation which began in the *College* case were, as we have seen, continued in the Bank crisis. Story’s brilliant drafting abilities, too, were at Webster’s command and included such large matters as bankruptcy legislation, the Crimes Act of 1825, and the Judicial Reorganization Act of 1825-

⁵¹ John Lowell to a medical professor [James Jackson?], Nov. 22, 1831, *Corporation Papers*, Harvard University Archives.

⁵² Lawrence to Webster, May 7, 1828, *Webster Papers*, N. H. Hist. Soc. Otis to Webster, Feb. 18, 1833, *Webster Papers*, N. H. Hist. Soc.

⁵³ Webster to Hopkinson, Dec. 9, 1833, *Hopkinson Papers*, Pa. Hist. Soc.

⁵⁴ Webster to Everett, Dec. 21, 1823, *Writings and Speeches*, *op. cit.* *supra*. Note 8, at 336.

⁵⁵ Webster to Mason, Dec. 22, 1823 [copy]; Mason to Webster, Dec. 29, 1823, *Webster Papers*, N. H. Hist. Soc.

⁵⁶ The Webster-Story relationship was explored in a different context in my article, “A Note on the Whig Politics of Justice Joseph Story,” *Mississippi Valley Historical Review*, vol. 48 (Dec., 1961), 480-491.

26.⁵⁷ On hot political issues like internal improvements and the Dorr Rebellion, the Judge was on hand with arguments and policy.⁵⁸ On occasion Story even supplied Webster with "thunder for his speeches," as Theodore Parker put it: "Help me make a speech," Webster implored, "I wish to say something on this N.E. boundary; & desire to be able to resist, in limne, both in English and American authorities, one of the principal preliminary grounds taken by the English diplomatists."⁵⁹ Story did more in the Ashburton negotiations than speechify; he supplied answers to complex legal questions concerning the Creole affair, furnished drafts of treaty articles on extradition, gave legal advice on the McLeod controversy, and in general provided Webster with needed legal and historical information.⁶⁰ "You can do more for me than all the rest of the world," Webster once wrote,⁶¹ and there is no reason to challenge this generous assessment of his friend's services.

The same men who aided Webster in matters of high politics nourished his private enterprises as well. While admitting to Jeremiah Mason that the "practice of asking the advice of friends in one's own affairs, is a little old fashioned,"⁶² he called for such advice. Nicholas Biddle even without being asked felt free to proffer political advice: "Do not leave your present position," he insisted during the cabinet crisis of 1843, "If you do, you descend."⁶³ Judge Story, too, impressed with the dual threat of Jacksonianism and

⁵⁷ "I should feel greatly obliged to you," wrote Webster, "if in the multitude of your concerns you could find time to make a dft. [draft] of a Bankrupt Law. I am pledged to do something on that subject and mean to bring it forward early in the session. . . . As far as convenient please place *references* in margin." Webster to Story, Nov. 10, 1825, Mass. Hist. Soc., *Proceedings*, 2d Series, vol. 14, 405. For their cooperation in the Crimes Act and Judicial Reorganization Act see: *Life and Letters*, *op. cit. supra*. Note 44, vol. 1 at 440; Webster to Story, Dec. 9, 1816, Mass. Hist. Soc., *Proceedings*, 2d Series, vol. 14, 399; Webster to Story, Dec. 26, 1826, *Writings and Speeches*, *op. cit. supra*. Note 8 at 412-413.

⁵⁸ Webster to Story, April 13, 1828, *Story Papers*, Lib. of Cong.; Story to Webster, April 26, 1842, *Webster Papers*, N. H. Hist. Soc.

⁵⁹ Webster to Story, May 12, 1838, Mass. Hist. Soc., *Proceedings*, 2d Series, vol. 14, 409.

⁶⁰ Story to Webster, March 26, and April 19, 1842, *Writings and Speeches*, *op. cit. supra*. Note 8, vol. 16 at 364-365, 368-369.

⁶¹ Webster to Story, April 9, 1842, Mass. Hist. Soc., *Proceedings*, 2d Series, vol. 14, 410.

⁶² Webster to Mason, March 20, 1828, *Writings and Speeches*, *op. cit. supra*. Note, vol. 16 at 175.

⁶³ Biddle to Webster, Feb. 27, 1843, *Webster Papers*, Lib. of Cong.

Calhounism, came to the personal support of Webster in a eulogistic article in the *New England Magazine*.⁶⁴ And the commercial elite, whose interests Webster so frequently pleaded, rallied in support of his personal political career when the collapse of his improvident land speculations in the wake of the depression of 1837 threatened to keep him from the Senate. Capitalists in Boston and New York magnanimously raised \$100,000 by subscription to sustain their impoverished spokesman—apparently retaining him in politics as they had in law.⁶⁵

In assessing Webster's membership in Tocqueville's American aristocracy, one is immediately struck with the truth of Edward Everett's observation that "Every one must feel that, in the case of Mr. Webster, the lawyer and the statesman have contributed materially to form each other."⁶⁶ In the House and Senate and as Secretary of State, knowledge of the law provided him with the arguments, rhetoric, and expertise essential to political action. At the bar his mastery of high policy added depth and persuasiveness to—and sometimes substituted for—his legal arguments. Finally, the relationship of politics and law and the expeditious implementation of it permitted him to bolster his own great ability with the talents of a conservative professional elite and the power of a unified economic class.

The irony, frequently ignored, is that this dual role of lawyer-politician which effectually advanced his statesmanship detracted from his legal accomplishments, his high historical reputation to the contrary notwithstanding. Webster's problem was that he attempted to pursue both law and politics exactly at the time when both were becoming specialized, full time professions. Webster himself recognized the dilemma. "I find I am growing rusty in general knowledge," he wrote his friend Story in 1822, even before he formally re-entered politics, "& unless I can find or make some

⁶⁴ [Joseph Story], "Statesmen—Their Rareness and Importance. Daniel Webster," *New England Magazine*, vol. 7 (Aug., 1834), 89-104.

⁶⁵ "The project," wrote H. G. Otis about the Webster slush fund, "is to raise a fund of 100,000 dollars here and in N. York, the income to be settled on him and his wife for life. . . . It is confidently said that it will be filled, indeed is mainly so at the moment." Otis added that this was the third time "that the wind has been raised for him. . . ." Otis to G. Harrison, Feb. 7, 1845, *H. G. Otis Papers*, Mass. Hist. Soc. Webster's intimate connections with New York and Boston capitalists were no secret to contemporaries and must have fortified the suspicions of many about the aristocratic nature of the legal elite. C. W. Woodbury to Levi Woodbury, May 25, 1841, *Papers of Levi Woodbury*, Lib. of Cong.

⁶⁶ "Memoir of Daniel Webster," *Writings and Speeches*, *op. cit.* *supra*. Note 8, vol. 1 at 49.

leisure from my office, I shall shortly be neither more nor less than an *attorney*.”⁶⁷ By 1835, the frustration of squeezing two careers into one came to a climax, and a choice between law and politics seemed imperative. “As I am circumstanced at present,” he complained to William Sullivan, “I cannot practise extensively in the Supreme Court, because I cannot leave the Senate long enough to go through an important cause. *Non possumus omnia*. I must leave off saying, ‘Mr. President,’ or leave off saying, ‘May it please your Honors,’ . . .”⁶⁸ To choose was difficult but “habits . . . and the nature of my pursuits for some years,” he confessed to Mason, “render it more agreeable to me to attend to political than to professional subjects.”⁶⁹ The collapse of investment schemes by which he hoped to relieve entirely the necessity of professional business thwarted his plan to leave the courts, and he spent the remainder of his life in frustrated attendance on them.

Webster’s failure to extricate himself from too many professions contributed measurably to a decline in professional competence. As early as 1830, the pressure had begun to tell, as a humorous encounter with his great and friendly rival William Wirt indicates. In the midst of arguments before the Supreme Court in the important *Astor* cause,⁷⁰ Webster got a postponement on the ground that he was confined to bed with illness. Wirt, in genuine Southern style, called to commiserate and, to his amazement, found Webster, as he recalled, “over his law books preparing his answer to my speech.”⁷¹

When such gentle deceits and last-minute cramming failed, the results were apt to be disastrous. Charles Sumner, fresh from Story’s law classes, full of new-learned law and high professional ideals, caught Webster in one such moment of truth. In the case of *Binney v. The Chesapeake and Ohio Canal Co.* (1834),⁷² Sumner reported, perhaps a little too triumphantly, back to the law school,

⁶⁷ Webster to Story, Sept., n. d., 1822, *Writings and Speeches*, *op. cit. supra*. Note 8, vol. 16 at 70.

⁶⁸ Webster to William Sullivan, Feb. 23, 1835, *Writings and Speeches*, *op. cit. supra*. Note 8, vol. 18 at 10.

⁶⁹ He determined not to accept engagements before the Supreme Court “unless under special circumstances.” Webster to Mason, Feb. 6, 1835, *Writings and Speeches*, *op. cit. supra*. Note 8, vol. 16 at 252. After 1835, in fact, Webster averaged 3.06 Supreme Court cases per year as against 7.55 per year for the peak period, 1820-1830.

⁷⁰ *Carver v. Jackson*, 4 Pet. 1 (1830).

⁷¹ William Wirt to Elizabeth Wirt, Feb. 6, 1830, *Wirt Papers*, Md. Hist. Soc.

⁷² 8 Pet. 201.

that Webster was "doing the labor in court which should have been done out of court . . . All here declare that he has neglected his cases this term in a remarkable manner. It is now whispered in the room that he has not looked at the present case, though the amount at stake is estimated at half a million dollars." Sumner's assessment that "politics have entirely swamped his whole time and talents" is straight to the point.⁷³ The extensive dependence on friends recorded in Webster's correspondence in matters of private and public law (only a part of which has been referred to) serves to corroborate Sumner's judgment—and further illustrates the value to Webster of his professional connections.

As for a realistic evaluation of Webster's legal attainments, Benjamin Waterhouse's assessment rings true: "He is a very good Lawyer, but there never was yet a very learned and able lawyer, who was at the same time an able politician."⁷⁴ Refining Waterhouse's evaluation a bit, one might admit the brilliance and the impact of Webster's great moments and his unsurpassed force in questions of constitutional policy and yet, in light of the evidence, question the accuracy of his reputation as the leading lawyer of the age, the undisputed head of the federal bar. Surely the picture of Jupiter striking down his foes—the devil himself not excluded—with his own profound legal lightning does not correspond to the facts, say, of the *College* cause, or of his confessedly frustrated professional life and his consequent embarrassing dependence on his friends for legal advice.

Nor was the problem only Webster's political distractions. In response to the national and international expansion of commerce, the rise of corporate capitalism, and the general increase in social complexity, American jurisprudence was becoming technical, sophisticated, and voluminous. The old ideal American lawyer, the practitioner who was at home in all branches of jurisprudence, in the classics, history, and *belles lettres* as well, and who dipped into politics and statecraft for breadth of vision, was retreating before the formally trained, full-time expert, as Webster's disastrous encounter with Horace Binney and John Sergeant in the famous Girard will case, *Vidal et al. v. Philadelphia* (1844), illustrates. Though the specialist did not make his appearance until the post-Civil War period, Webster was caught up in the first stages of the transition. His practice of farming out legal business, of garnering

⁷³ Sumner to Professor Simon Greenleaf, March 3, 1834, *Memoir and Letters of Charles Sumner*, ed. Edward Pierce (4 vols., 1877-1893), vol. 1, 135.

⁷⁴ Waterhouse to Levi Woodbury, Feb. 9, 1835, *Papers of Levi Woodbury*, Lib. of Cong.

law from his professional friends (one which resembled the British solicitor-barrister relationship and prefigured the modern multi-man law establishment) was, in fact, partly a response to the rising complexity of the law. That he held on in both law and politics, even with his improvisations, is a tribute to his genius.

Webster's preeminence as a lawyer's lawyer may be open to question; his greatness as a lawyer-politician is not. The pattern of widespread dependence on others in law and politics, viewed in another way, points up the broad base of power which he commanded. Basic to the exercise of that power was Webster's flawless employment of the functional relationship between law and commercial-industrial capitalism. Both as lawyer and politician, he was a broker between the capitalist interest group and the power of the state. In this capacity, his genius was not in technical, scientific law but in applied law, not in speculative political theory but in belly politics, not in idealism but in functionalism and expediency. Behind his great moments in constitutional argumentation was an inimitable appropriation of law to high policy.

That American law should have so expeditiously served his political ends says much about the nature of ante-bellum jurisprudence. For all its scientific and technical aspirations, its rhetoric of morality and natural law, it was preeminently practical. It was an earthbound vehicle which carried the needs and aspirations of the American people—or rather of those special interest groups into which that people was divided and which were strong enough to be heard. Of those interest groups, the most dynamic and unified in purpose was commercial-industrial capitalism. Webster's amalgamation of law, politics, and economics made him indispensable to this class and thus the prototype (and possibly the model) of Tocqueville's lawyer. For basic to Tocqueville's idea of the American aristocracy was the recognition of the functional nature of American law and the union of legal expertise with economic class. Given the relatively uninstitutionalized nature of American society, such a power elite left an impression on public policy disproportionate to its numbers.

Tocqueville's thesis, with Webster as a case in point, suggests the need and possibility of further investigation. His brief discussion, of course, wants qualification and refinement. A picture of a legal establishment as exclusively aristocratic will not suffice in an age when admission to the fraternity was without serious restriction. To categorize the legal profession as uniformly conservative and consistently anti-democratic is equally untenable when lawyers clearly peopled both parties and championed all varieties of political-economic policy. Yet, there seems strong evidence that an iden-

tifiable, self-conscious, and dominant portion of the profession was found consistently in collusion with the advance guard of commercial and industrial capitalism and that this union was and continued to be a power to reckon with. If this is true, the theory of a classless society, operating in a climate of consensus-continuity, extracted from Tocqueville by recent scholars, seems in need of modification, at least in regard to the source and exercise of social power—as it was in fact tentatively modified by the master himself. The possibility deserves further study.